89-1940

No.

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1989

EDWARD TEIGHMAN, et al.,

Petitioners,

v.

ERIC KOLKHORST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF PARTIES

The parties to the proceedings below were the petitioners, Edward Pitcher, Commissioner of the Baltimore City Police Department, and the Baltimore City Police Department, and the respondent, Eric Pelham.

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No.

In The

Supreme Court of the United States

October Term, 1959

EDWARD TILGHMAN, ET AL.,

Petitioners,

v.

ERIC KOLKHORST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

As a result of a settlement reached in an earlier and unrelated case, Kindrat v. Powerleau, No. 79-2998 (D. Md. 1979), the Department, which employs approximately 2000 police officers, established a one hundred person limit on the number of officers who are permitted to join an active military reserve unit. Under the Department's rules, after the one hundred person limit is reached, other officers who request to join the reserves are placed on a waiting list until an opening occurs. An exception is made for those new hires who, at the time of their application for employment with the Department, are members of an active military reserve unit. These individuals are not barred from remaining an active reservist even if the one hundred person maximum has been reached. At the time Kolthorst applied for his job with the Department, 120 officers were members of an active reserve unit, and 15 officers were on the waiting list.

The Department justified its policy limiting the number of police officers who are allowed to join active military reserve units on these considerations: the activation of local reserve units during civil disturbances or other emergencies depletes the Department's manpower to a point which can jeopardize public safety; and, the majority of reserve training exercises take place during the summer months, when vacation and other normal leave requests are also highest, thereby impacting upon the available manpower for conducting routine police operations.

When Kolkhorst completed his application for employment with the Department, he explained his situation to Department employees who instructed him to indicate on the form that he was not a member of an active military reserve unit which regularly drilled, and that he had no periodic training obligations. Thereafter, in December of 1985, Kolkhorst applied for permission from

the Department to join an active military reserve unit. The Department failed to respond to his applications. On February 1, 1986, Kolkhorst accepted a three-year assignment to a Selected Reserve Unit. On February 4, 1986, Kolkhorst again submitted a request for permission to join an active unit. The Department denied this request, but placed Kolkhorst on its waiting list for openings on the one hundred person reservist list.

Kolkhorst received orders to report to Camp Lejeune in North Carolina for annual military training between July 31 and August 16, 1986. Kolkhorst informed his superior officers in late May of his upcoming training exercises. Subsequently, the Department began to inquire into Kolkhorst's reserve status, and on July 8, 1986, the Department orally informed Kolkhorst that his request for leave in order to train had been denied. On July 23, 1986, Kolkhorst

received a Departmental memorandum directing him to remove himself immediately from active military reserve status. Kolkhorst complied with this directive on the following day.

On October 3, 1986, Kolkhorst brought suit in the United States District Court for the District of Maryland, claiming that his right to become an active member of a military reserve unit under the Veterans' Reemployment Rights Act, 38 U.S.C. Sections 2021-2026 ("VRRA"), was violated by the Department's policy restricting the number of police officers who were eligible to serve as active reservists. Kolkhorst sought both declaratory and monetary relief. On June 13, 1988, the lower court granted summary judgment in favor of Kolkhorst. By a revised order dated February 15, 1989, the district court also awarded Kolkhorst damages totalling $4,164 as compensation for lost income and benefits that he would have earned by participating in reservist training.

The Fourth Circuit affirmed, holding that the Department's refusal to grant Kolkhorst leave for military reservist training violated 38 U.S.C. Section 2024(d). The Court held that the reasonableness, vel non, of Kolkhorst's request, or its impact upon the Department, was irrelevant in determining whether Section 2024(d) was violated, stating that "[t]here was nothing in the VRRA, its legislative history, or the Monroe [v. Standard Oil Company, 452 U.S. 549 (1981)] decision to indicate that a reservist is entitled to a leave of absence in order to participate in military training only if the request is reasonable." See Appendix, p. 19a, infra (emphasis in original). The Court held that the reasonableness standards that other courts of appeals have construed from the VRRA are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units.

The Court went on to hold, however, that even if a standard of reasonableness is applied to Section 2024(d), Kolkhorst's request for training leave was reasonable and the Department's policy limiting to 100 the number of police officers that are eligible to serve as active military reservists is unreasonable per se under any possible formulation of the test.

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT'S HOLDING THAT A RESERVIST HAS AN ABSOLUTE RIGHT TO MILITARY LEAVE, REGARDLESS OF THE REASONABLENESS OF HIS REQUEST OR ITS IMPACT ON THE EMPLOYER, IS IN CONFLICT WITH HOLDINGS BY OTHER COURTS OF APPEALS

The Fourth Circuit's holding that the reasonableness of a reservist's request for leave is irrelevant under Section 2024(d) is in

conflict with the Fifth Circuit's holding in Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), the Eleventh Circuit's holding in Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987), and the Third Circuit's holding in Eidukonis v. Southeastern Pennsylvania Transportation Authority, 873 F.2d 688 (3rd Cir. 1989). As a result of the conflict, the standards applicable to reservist leave and employment vary from one jurisdiction to the next, a situation Congress surely did not intend, and one which the Fourth Circuit recognized as unfortunate. An authoritative decision by this Court is essential to make uniform the law affecting thousands of reservists and employers governed by the provisions of the Veterans' Reemployment Rights Act.

Monroe v. Standard Oil Company, 452 U.S. 549 (1981) marked this Court's first occasion to address issues arising from the statutory

provisions, codified at 38 U.S.C. Section 2021 et seq., specifically dealing with military reservists. 452 U.S. at 564. In Monroe the Court granted certiorari to consider the petitioner's contention that an employer has a statutory duty to make work scheduling accommodations for reservist employees not made for other employees, whenever such accommodations reasonably can be accomplished. 452 U.S. at 561. The reservist in Monroe worked for an oil refinery which operated 24 hours a day, 7 days a week, and which scheduled its employees to work 5 eight-hour days in a row weekly, but in a different five-day sequence each week, and which, pursuant to a collective bargaining agreement, allowed an employee, with the acquiescence of his foreman and if the change would not require the payment of overtime, to exchange shifts with another employee. The reservist-employee attended training with his reserve unit one weekend a

month, and on a number of weekends he was required to attend training on days he was scheduled to work at the refinery. In most instances he was unable to exchange shifts with another employee and although his employer provided him with leaves of absence to attend training, as required by 38 U.S.C. Section 2024(d), it did not pay him for the hours he did not work, nor did it take steps to permit him to make up those hours by working outside his normal schedule.

In Monroe this Court held that an employer is not required by 38 U.S.C. Section 2021(b)(3) to make work scheduling accommodations for employee-reservists not made for other employees, since Section 2021(b)(3) was enacted for the limited purpose of protecting the employee-reservist against discriminations like discharge and promotion, motivated solely by reservist status. 452 U.S. at 561.

The question presented by the instant petition for certiorari is whether a reservist [illegible] is entitled to military leave, [illegible]

[illegible]

[illegible]

[

his civilian employment rights would continue. Law sought permission a few days before the expiration of his original leave to remain on leave. Permission was denied and Law was eventually discharged. In ruling on Law's suit seeking reinstatement, the district court found for the employer, stating that the period for which leave of absence is given "must be reasonable both in the context of the reservist's military obligation and the requirements of the employer." 614 F.2d at 888. The Fifth Circuit affirmed, noting that Law "completely ignored the difficulties faced by the City in carrying out its important police duties." 614 F.2d at 889.

In Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987), the employee in question was a secretary in the corporate planning department and a medic with the army reserve. She sought a one year leave to participate in a forward practical nurse

training program. When the employer denied the request but realized he would leave with or without its permission, it filed a declaratory judgment action. The district court held that the employee's leave request was unreasonable and that, therefore, said leave did not violate the act in denying the request. On appeal, the Eleventh Circuit reversed, holding that the reservist's request for leave was reasonable. However, the Eleventh Circuit recognized that the employee reservist's leave rights were not absolute, and were subject to the test of reasonableness. 811 F.2d at 1501.

In Eidukonis v. Southeastern Pennsylvania Transportation Authority, 872 F.2d 588, 590 (3rd Cir. 1989), the Third Circuit held "that a standard which evaluates the employee's request for leave and the civilian employer's response on the basis of reasonableness under all of the circumstances is the appropriate one to use under 38 U.S.C. Section 2024(d). In so doing,

the employment relation between employee-reservists and employers was considered significant enough by Congress to warrant protection. Congress' intent to create a uniform standard governing this employment relationship is being frustrated by the conflicting decisions of the Courts of Appeals. A decision by this Court on this important issue is warranted.

Petitioner submits that the Fourth Circuit's disposition of this case by way of summary judgment was erroneous. Triable issues of fact exist concerning the reasonableness of both the employee-reservist's request for leave and the employer's response.

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(1) Pet. at 10a. Additionally, the case was remanded so the District Court could reconsider its findings of fact and conclusions of law in light of the proper standard, taking into consideration the effect of the employee-reservist's request for military leave upon illegitimate business interests of the employer.

Both the District Court (which did not think the impact of military leave on the employer was relevant) and the Court of Appeals failed to give any weight to petitioner's compelling interest in maintaining public safety. In Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981) the Court had to consider the impact on the Pensacola police department and public safety of the absence of one individual officer for six months. The court upheld the employer's right to deny the request for military leave.

Petitioners submitted evidence tending to prove the reasonableness of the policy limiting to one hundred the number of police officers (other than new hires) who are allowed to join active military reserve units. The record contains an affidavit of Police Commissioner Robinson, detailing some of the hardships leading to adoption of the policy in question. The majority of requests for military leave occur during the summer months, and shortages in

manpower within the Department occur when reserve units are called to emergency duty. An increase in the number of officers authorized to join the active reserves has a detrimental effect on the functions of the Department, which is already shorthanded. Additionally, the record contains the affidavit of Colonel Joseph W. Nixon, detailing other hardships. The 126 men on the "100 man" list will increase as newly hired officers who are already members of active units are hired. The only feasible way of controlling increase in membership in the active reserve is to maintain a limit. It is impractical to shuffle officers from district to district to cover manpower shortages occasioned by military leave. Thirty-nine percent of vacation leaves occur during the same summer months when military leaves are most frequently requested. Absences by reservists from small

specialized units, (helicopter, horse, motorcycle, and quick response) justify the Department's policy.

The Baltimore City Police Department justifiably has relied upon the clear policy of limiting the number of officers allowed to join the reserves out of concern over public safety issues. Kolkhorst's employer differs markedly from other employers who have had to deal with employees with military obligations. The Department's policy does not per se violate the VRRA. Its underlying rationale attempts a reasonable accommodation to overcome certain hardships not faced by employers outside the field of public safety.

The differences between the Department and other employers are obvious and dramatic and beg for a different treatment from the approach given private sector employers. First and foremost, the Department exists as a public agency. The major purpose of the agency is to

enforce the laws of the State of Maryland and City of Baltimore, and to ensure that the citizens of Baltimore receive adequate police protection on a 24 hour basis. It is not a for profit entity. The funding for the Department is not generated via profit seeking investors, but simply by tax revenues collected from the general public. The expected return from the taxpayer investment of revenues into the Department is the satisfaction of knowing that the lives and property of the general public will be properly safeguarded by qualified police personnel. The Department, therefore, acts in the best interests of the citizens of the City of Baltimore. These considerations militate in favor of measuring and weighing the interests of the Department in maintaining its policy concerning reserve involvement.

Moreover, the respondent employee-reservist's request for military leave cannot be viewed in isolation, but must be

viewed in the context of the overall cumulative effect that membership in the reserves has on the operation of the police department. The Court of Appeals disregarded these considerations in granting summary judgment.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1501

ERIC FOLKENFLIK,

Plaintiff-Appellee,

versus

EDWARD TILGHMAN, Commissioner,
Baltimore City Police Department;
BALTIMORE CITY POLICE DEPARTMENT,

Defendants-Appellants,

ELIZABETH H. DOLE, SECRETARY OF
LABOR,

Amicus Curiae.

No. 89-1502

ERIC FOLKENFLIK,

Plaintiff-Appellant,

versus

EDWARD TILGHMAN, Commissioner,
Baltimore City Police Department;
BALTIMORE CITY POLICE DEPARTMENT,

Defendants-Appellees.

ELIZABETH H. DOLE, SECRETARY OF LABOR,

Amicus Curiae.

Before ERVIN, Chief Judge, WILKINSON, Circuit Judge, and YOUNG, Senior United District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Wilkinson and Judge Young joined.

ERVIN, Chief Judge:

Eric Folkhorst ("Folkhorst"), a police officer, brought this action for declaratory and monetary relief against his employer, the Baltimore City Police Department (the "Department"), and Bishop L. Robinson, the Department's Police Commissioner (the "Commissioner"), contending that his right, under 38 U.S.C. Section 2024(d), to become an active member of the Marine Corps reserves was

violated by a Department policy limiting to one hundred the number of police officers (other than new hires) who are allowed to join active military reserve units. The district court granted Kolkhorst's motion for summary judgment, holding that the Department's policy violated Section 2024(d). Accordingly, the lower court entered an order directing the Department to permit Kolkhorst to join an active Marine Corps reserve unit, and awarded damages to Kolkhorst in the amount of $4,164 for lost military benefits which he would have earned had he been allowed to train with an active reserve unit. The Department and the Commissioner now appeal that decision, claiming that the court below erred in construing Section 2024(d). Kolkhorst cross-appeals the amount of damages. The Secretary of Labor filed an amicus brief, arguing that Section 2021(b)(3) of the VRRA makes it unlawful for an employer to discriminate against its employees who want to

serve as active military reservists. For the reasons articulated below, we affirm the decision of the district court in all respects.

I.

The parties are in general agreement regarding the essential facts of this case. Kolkhorst joined the Department in June of 1982. Prior to becoming a police officer, Kolkhorst had served four years on active duty in the United States Marine Corps, during which time he had attained the rank of Captain. Upon his discharge from active duty in 1977, Kolkhorst became a member of the Marine Corps Ready Reserve (the "Ready Reserve"), which is comprised of the Individual Ready Reserve (the "IRR") and the Selected Marine Corps Reserve (the "Selected Reserve"). Although Kolkhorst previously alternated between the IRR and the Selected Reserve, at the time he applied for his position with the Department, Kolkhorst was a member of IRR. All members of the Ready Reserve may be called to active duty

in the event of war, a national emergency or when otherwise authorized by law. The primary distinction between the IRR and the Selected Reserve is that members of the IRR have no required training obligations, although they may participate in training if they wish. In contrast, members of the Selected Reserve must attend monthly drills and participate in an annual two-week training exercise. Thus, when Feldhorst applied for and commenced his job with the Department, he was not a member of an active military reserve unit, and had no drill or camp obligations to satisfy.

As a result of a settlement reached in an earlier and unrelated case, Kundrat v. Somerlesu, No. 79-2908 (D. Md. 1979), the Department, which employs approximately 2000 police officers, established a one hundred person limit on the number of officers who are permitted to join an active military reserve unit. Under the Department's rules, after the

one hundred person limit is reached, other officers who request to join the reserves are placed on a waiting list until an opening occurs. An exception is made for those new hires who, at the time of their application for employment with the department, are members of an active military reserve unit. These individuals are not barred from remaining an active reservist even if the one hundred person maximum has been reached. At the time Feldhorst applied for his job with the department, 125 officers were members of an active reservist unit, and 11 officers were on the waiting list.

When Feldhorst completed his application for employment with the department, he explained his situation to department employees who instructed him to indicate on the form that he was not a member of an active military reserve unit which regularly drilled, and that he had no periodic training obligations. Thereafter, on at least two occasions in December of 1985, Feldhorst

applied for permission from the Department to join an active military reserve unit. The Department failed to respond to these applications, and on February 1, 1980, Kolkhorst accepted a three-year assignment to a Selected Reserve Unit. On February 6, 1980, Kolkhorst again submitted a request for permission to join an active reserve unit. The Department denied this request, but placed Kolkhorst on its waiting list for opening on the one hundred person reservist list. Despite the fact that the Department denied his request, Kolkhorst apparently arranged leaves of absence with his immediate superiors to enable him to train on weekends with his reserve unit. This unofficial arrangement worked well for several months.

In October 1980, however, when Kolkhorst received orders to report to Camp Lejeune in North Carolina for annual military training between July 5 and August 10, 1980, Kolkhorst informed his superior officers in late May of

his upcoming training exercises. Subsequently, the Department began to inquire into Kolkhorst's reserve status, and on July 8, 1986, the Department orally informed Kolkhorst that his request for leave in order to train had been denied. On July 23, 1986, Kolkhorst received a Departmental memorandum directing him to remove himself immediately from active military reserve status. Kolkhorst complied with this directive on the following day.

On October 3, 1986, Kolkhorst brought this suit in the United States District Court for the District of Maryland, claiming that his right to become an active member of a military reserve unit under the Veteran's Reemployment Rights Act, 38 U.S.C. Sections 2021-2026 ("VRRA"), was violated by the Department's policy restricting the number of police officers who were eligible to serve as active reservists. Kolkhorst sought both declaratory and monetary relief. The

parties filed cross-motions for summary judgment, and on June 13, 1988, the lower court granted summary judgment in favor of Kolkhorst. The court held that the "Department's one hundred person limit on the number of officers who may be active reservists was unlawful," and ordered the Department to grant Kolkhorst's request that he be permitted to join the Selected Reserve. By a revised order dated February 15, 1989, the court also awarded Kolkhorst damages totalling $4,164 as compensation for lost income and benefits that Kolkhorst would have earned by participating in reservist training. These appeals followed.

II.

As a preliminary matter, we note that summary judgments and matters of statutory construction are reviewed de novo on appeal. See Higgins v. E.I. DuPont De Nemours & Co., 863

F.2d 1162, 1166-67 (4th Cir. 1988); United States v. Daughtrey, 874 F.2d 213, 218 (4th Cir. 1989). Applying the foregoing standard of review to the legal questions presented by this case, we conclude that the Department's reservist policy is inconsistent with the provisions of 38 U.S.C. Section 2021(b)(3), that the Department's refusal to grant Kolkhorst's request for military training leave violates the broad protections afforded by 38 U.S.C. Section 2024(d), and that an employee may be entitled to compensation for lost pay and benefits under 38 U.S.C. Section 2022 in cases where an employer unlawfully refuses to allow a reservist to participate in military training.

III.

The VRRA provides that any employee of a state, or a political subdivision thereof,

"shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. Section 2021(b)(3). In Monroe v. Standard Oil Co., 452 U.S. 549, 559-60, 101 S. Ct. 2510, 2516-17, 69 L.Ed.2d 226, 235-36 (1981), the Supreme Court reviewed the legislative history of Section 2021(b)(3), and concluded that this provision

> was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion motivated solely by reserve status. Congress wished to provide protection to reservists comparable to that already protecting the regular veteran from "discharge without cause" -- to insure that employers would not penalize or rid themselves of returning reservists after a mere pro forma compliance with Section 2024(d). And the consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations.

Thus, employees covered by Section 2021(b)(3), such as Kolkhorst, may not be discriminated against by their employers or otherwise placed at a disadvantage by them because of their service in the military reserves. In this case, the Department's written order instructing Kolkhorst to either withdraw from the active reserves or face dismissal strikes to the very heart of Section 2021(b)(3)'s prohibition against terminating an employee because of his reservist training obligations. Simply stated, the Department planned to fire Kolkhorst, without cause, if he insisted on exercising his statutory right to train with a military reserve unit. This otherwise unjustified threat of termination represents an impermissible encroachment upon the normal incidents and advantages of Kolkhorst's employment. Accordingly, we hold that the Department's official reservist policy, which clearly precipitated the unlawful measures taken by the Department and the

Commissioner, conflicts directly with the language and purpose of Section 2021(b)(3), and cannot be countenanced thereunder.

IV.

We turn next to the question of whether the Department's refusal to grant Kolkhorst leave for military reservist training constituted a violation of 38 U.S.C. Section 2024(d). That provision of the VRRA provides:

> Any [military reservist] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee:s discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

38 U.S.C. Section 2024(d). In Monroe, the Supreme Court noted that Section 2024(d) was enacted "to deal with the problems faced by employees who had military training obligations lasting less than three months. This section provides that employees must be granted a leave of absence for training and, upon their return, be restored to their position with such seniority, status, pay, and vacation as they would have had if they had not been absent for training." 452 U.S. at 555, 101 S. Ct. at 2514, 69 L.Ed.2d at 212-13 (1981) (citations omitted).* The issue raised by the parties in this case is whether a standard of reasonableness should be read into Section 2024(d), as has been done by a number of other federal courts.

*At the time Monroe was decided, most reservist training could be accomplished within 90 days. Indeed, the most prevalent form of training for reserve units was, and remains, the two-week summer camp plus monthly drills. Under the current statutory scheme, however, valid leave requests of substantially longer duration

are not uncommon. See, e.g., Ingram, Lemmon, Cronin and Bottger, which are discussed briefly in Part VI of this Opinion.

V.

The reasonableness standard was first applied to 38 U.S.C. Section 2024(d) in Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), which was decided approximately five months before the Supreme Court's decision in Monroe. In Lee, the Fifth Circuit quoted with apparent approval from the district court's opinion, which concluded:

> Congress [in enacting Section 2024(d)] did not intend thereby to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship. The training period for which leave of absence is given must be reasonable both in the context of the reservist's military obligation and the requirements of the employer.

Id. at 888. Thus, Lee is often cited for the proposition that, despite the unequivocal and unqualified language of Section 2024(d), a reservist is entitled to a leave of absence from

his job in order to participate in military training only if the reservist's request is reasonable with regard to both the employee and the employer. Several jurisdictions have followed Lee and applied a standard of reasonableness under Section 2024(d). See, e.g., Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1468-69 (11th Cir. 1987); Hottger v. Ross Aeronautical Services, Inc., 609 F. Supp. 583, 586 (M.D. Ala. 1985); Anthony v. Basic American Foods, Inc., 600 F. Supp. 352, 355 (N.D. Cal. 1984). The formulation of the standard of reasonableness has varied markedly among these courts, however.

In Anthony, for example, the court held that a reservist's "leave request should be evaluated according to whether it was reasonable both in light of 1) the circumstances giving rise to the request and 2) the requirements of the employer." 600 F. Supp. at 355. In contrast, the Hottger court suggested that the

that "the type, duration and frequency of any particular course of military training must also be presumed reasonable."

II.

We do not believe that reasonableness is required under Section 2024(d). There is nothing in the VRA, its legislative history, or the Manual to indicate that a reservist is entitled to a leave of absence in order to participate in military training only if the request is reasonable based on a judicially created standard that varies from one jurisdiction to the next. Rather, the VRA unconditionally provides that any reservist "shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive-duty training in the Armed Forces of the United States." 38 U.S.C. Section 2024(d) (emphasis added). In Monroe, the Supreme Court emphasized that under Section 2024(d) "employees must be

granted a leave of absence for training and, upon their return, be restored to their position with such seniority, status, pay, and vacation as they would have had if they had not been absent for training." 452 U.S. at 565, 101 S. Ct. at 2514, 69 L.Ed.2d at 211 (emphasis added). In short, the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers.

Even if a standard of reasonableness were applied to Section 2024(d), we believe that Kolkhorst's request for training leave was reasonable and that the Department's policy limiting to one hundred the number of police officers that are eligible to serve as active military reservists is unreasonable per se under any possible formulation of the test. First, Kolkhorst's requested leave for reserve duty was

reasonably made and reasonable in content. He submitted three applications for training leave to the Department. The first request was made more than two months before his training was scheduled to commence, which we conclude was reasonable. Moreover, contrasted against the requests found in other published cases brought under Section 2024(d), the duration of the leave sought by Kolliboust for routine and mandatory training clearly falls within the statute's intended scope.

In Ingram, for example, the reservist requested a one-year leave of absence to attend a voluntary nursing program. The request was held to be reasonable. 811 F.2d at 1466, 1470. In Lee, the reservist had requested and received a seven-week leave of absence to attend an officer training course. A few days before the expiration of the original leave of absence, the reservist applied for and was denied a

five-month extension in order to complete additional parts of the training program. In that case, the supplemental request for leave was deemed to be unreasonable. 634 F.2d at 887-88, 890. In Lemon, the court stated that a three-year leave of absence for purposes of specialized technical training was not inherently unreasonable. 686 F. Supp. at 802. In Cronin v. Police Dept. of the City of N.Y., 675 F. Supp. 847, 855 (S.D.N.Y. 1987), the court held that two consecutive leaves of absence for fourteen and thirteen months respectively for flight engineer training were reasonable. Finally, in Bottger, the court found that a request for a 26-day leave for special training immediately after a two-week leave for routine summer training was reasonable as a matter of law. 600 F. Supp. at 567.

Second, the Department's reservist policy is unreasonable per se because it prevents any active military training at all for individuals

like Kolkhorst who are not on the one hundred person reservist list. In other words, the Department does not even consider the reasonableness of an employee's request for leave if the employee is not one of the one hundred persons eligible for reservist training. By illustration, if all one hundred persons of the Department's reservist list request leave to train during eleven months of the year, and an individual on the waiting list applies for leave in the twelfth month, the request will be denied summarily merely because the employee is not on the approved list, and not because the request is demonstrably unreasonable or places an unreasonable burden on the Department. In other words, the policy presumes that any request for leave made by an individual not on the one hundred persons list is unreasonable. The Department thus asks that this court apply a standard of reasonableness, when its own policy lacks any semblance of reasonableness.

Therefore, if we were to apply a reasonableness standard under Section 2024(d), we would find that Kolkhorst's request for leave was entirely reasonable, and that the Department's arbitrary policy was not.

VII.

Monetary damages as compensation for violations of Section 2024(d) are authorized by 38 U.S.C. Section 2022, which provides that a district court has the power, regarding an employer who violates a person's rights under the VRRA,

> to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions.

38 U.S.C. Section 2022. Kolkhorst argues that the plain language of Section 2022 requires that the failure of an employer to grant a leave request in violation of Section 2024 exposes

that employer to liability for damages sustained by the reservist as a result of the employer's wrongful action. On the other hand, the Department asserts that Section 2022 applies only to wages and benefits which the employee would have earned from an employer, and not to income derived from the employee's military duty. Although there are no published cases directly on point, the express language of Section 2022 seems to accommodate Kolkhorst's claim for damages. That provision states that district courts are empowered to compensate a reservist "for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. Section 2022 (emphasis added). There is no dispute in this case that Kolkhorst was deprived of military duty pay and privileges when the Department ordered him to resign from the Ready Reserves and precluded him from training with his reserve unit. It should be noted that under the Department's existing

policies, all active reservists are entitled to fifteen days of paid leave per year to train with their reserve units, in addition to whatever vacation leave they have earned. We can see no reason, therefore, why Kolkhorst should not be allowed to recover on his damages claim.

However, Kolkhorst's cross-appeal on the amount of damages is denied because "[t]he trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decision will be upheld absent clear error." Little Beaver Enterprises v. Humphreys Railways, Inc., 719 F.2d 75, 79 (4th Cir. 1983); Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 149 (4th Cir. 1987) (also applying the clearly erroneous standard). We conclude that the award of damages in this case was not clearly erroneous.

VIII.

Based on the foregoing discussion, the judgment of the court below is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIC KOLKHORST :

v. : Civil No. JFM-86-3057

BISHOP L. ROBINSON, :
et al.

: : : : : : : : : : : :

OPINION

Plaintiff has instituted this action for declaratory and monetary relief against the Baltimore City Police Department and its Commissioner, contending that the Department has violated 38 U.S.C. Section 2024(d) by denying him permission to become an active member of the Marine Corps Reserves.[1] The Department's denial of plaintiff's request was on the basis of an internal policy limiting to one hundred the number of police officers (other than new hires)

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[1] Plaintiff also asserts a claim under Md. Ann. Code art. 65, Section 42 (1988). Because it finds plaintiff's federal claim to be dispositive, this Court does not reach the state law claim.

who may be active reservists.[2] There was a thirty-three person waiting list for these one hundred slots in February, 1987, when plaintiff made his application.

The parties have crossed-moved for summary judgment.

FACTS

Plaintiff joined the Department in June 1982. He had previously served in the Marine Corps, both on active duty and in the reserves, reaching the rank of captain. At the time he applied to join the Department he was in the Individual Ready Reserve, one of two components of the Marine Corps Ready Reserve. Unlike members of the Selected Marine Corps Reserve (the other component of the Marine Corps Ready Reserve), members of the Individual Ready Reserve have no required regular monthly and

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[2] This policy was formulated in connection with the settlement of a prior suit instituted in this Court, Kundrat v. Pomerleau, No. 79-2198. That suit was not a class action, and defendants do not contend that it is of any binding effect here.

annual training obligations, but they may engage in training if they wish. All members of the Ready Reserve are "liable for active duty" in time of war, national emergency or when otherwise authorized by law.

In a form that he filled out at the time of his application to the Department, plaintiff stated that he was not an active member of the military reserve and that he had no drill or camp obligations. He claims that he explained his situation to departmental employees while he was filling out the personal military history form and that he was told to fill out the form as he did.[3]

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[3] Defendants have submitted an affidavit from one of the police officers with whom plaintiff spoke when he was filling out his form which is consistent with plaintiff's account. In particular, in the affidavit the officer appears to equate active reserve status with being a member of a military reserve unit. As indicated in the text, at the time he filed his application plaintiff was not a member of a reserve unit.

In December 1985 plaintiff applied for permission to join a reserve unit. Neither this request nor one which he made several weeks later was answered. Plaintiff then took matters into his own hands, and on February 1, 1986 he accepted a three-year assignment to a Marine Corps Reserve Unit, an assignment which entailed regular weekend training and annual training of two weeks. On February 4th, plaintiff again submitted a request seeking permission to join a reserve unit. This time he received a response denying his request, pending an opening in the Department's reservist list of one hundred. Despite this denial of his request plaintiff apparently trained on weekends with his local unit for several months, arranging leaves of absence with his immediate superiors.

Matters came to a head following plaintiff's receipt of orders requiring him to report to Camp Lejeune for annual training between July 31 and August 16, 1986. Plaintiff informed his

immediate superiors in last May of the impending training. The Department then made inquiries with the Marine Corps regarding plaintiff's reserve status, and, on July 8, 1986, the Department orally informed plaintiff that his request for leave in order to train would be denied. On July 21, 1986 plaintiff received a memorandum from a senior officer in the Department ordering him "to take whatever action [is] necessary to remove yourself from active military status immediately." The memorandum concluded that "a written statement of compliance with the aforementioned order is required within twenty-four hours of the receipt of this directive." Plaintiff removed himself from active reserve status the next day. In October 1986 he filed this suit.

DISCUSSION

The express terms of 38 U.S.C. Section 2024(d) (1982) unequivocally require an employer to give any military reservist in its employ a

leave of absence to participate in military training and to permit the reservist to return to work under the same conditions which he was under when he took his leave of absence. This mandate is consistent with Congress' declaration that "the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve forces." Act of May 2, 1986, Pub. L. No. 99-250, Section 1(a)(1), 100 Stat. 413, 413. Public employees come within the purview of Section 2024(d), see 38 U.S.C. Section 2021(a)(B)(1982), and the case law is clear that the provisions of Section 2024(d) apply even though

the reservist volunteered for training. See, e.g., Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1469 (11th Cir. 1987); Lee v. City of Pensacola, 634 F.2d 886, 889 (5th Cir. Unit B 1981); Bottger v. Lee Aeronautical Services, Inc., 609 F.Supp. 583, 586 (M.D. Ala. 1985).

Although Section 2024(d) by its terms provides for no exceptions, Courts have used a rule of reason as the lubricant necessary to make the statutory machinery function. This rule was first adopted by the Fifth Circuit in Lee v. City of Pensacola, supra, at 889, and Lee's fundamental holding that reasonableness is the standard by which a reservist's rights and an employer's duties are to be measured has been uniformly accepted by other courts. However, these courts have disagreed as to what factors are to be considered in making the determination of reasonableness. Two courts have held that "the requirements of the employer" may be taken into account in evaluating whether a leave

request should have been granted. See, e.g., Bottger v. Doss Aeronautical Services, Inc., supra, at 586; Anthony v. Basic American Foods, Inc., 600 F.Supp. 952, 955 (n. D. Cal. 1984).[4] The Eleventh Circuit, on the other hand, has held that the burden placed upon the employer by the reservist's leave of absence is not to be considered unless the reservist himself has engaged in "questionable conduct," as did the reservist in Lee. See Gulf States Paper Corp. v. Ingram, supra, at 1470.

This Court has concluded that the approach taken by the Eleventh Circuit is the correct one. Every employer is to some degree burdened by being required to grant leaves of absence to employees. That burden is particularly heavy upon an employer like the Baltimore City Police Department, which employs a substantial number of reservists. However, Congress, acting well

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[4] It is to be noted that, notwithstanding their consideration of this factor, the Bottger and Anthony courts both ruled in favor of the reservist.

within the parameters of its power, has decided and decreed that the interest of national defense requires that employers make the adjustments necessary to allow reservists to participate in regular training. See Monroe v. Standard Oil Co., 452 U.S. 549, 565 (1981). This is not to say that an extremely sound case cannot be made for permitting municipal police departments to limit the percentage of their officers who may be in the active reserves at any one time. It might be said that, at least on a day-to-day basis, police departments are much more immediately involved in protecting the public safety than is the military reserve; their resources might well be needed to maintain order at the very time that an emergency requires the national guard to be called out; and, as the affidavits which defendants have submitted demonstrate, the required granting of numerous leaves of absence poses substantial manpower problems for a police department.

particularly during the summer months when annual reserve training is most frequently conducted. However, these are arguments which can only be addressed to Congress, not to this Court.[5]

The inquiry here must therefore focus solely upon the conduct of plaintiff himself in determining the reasonableness of his leave request. Nothing in the record suggests he has acted unreasonably or in an improper manner. Although at the time that he made his application to the Department he submitted a form indicating that he was not an active member of the military reserve, he has stated (and defendants have not contradicted his statement, see supra note 3) that he fully explained his situation to departmental employees who

---

[5] It was not until defendants filed their final memorandum in this case that it became apparent that the Department permits newly-hired officers to serve in the reserves. Defendants have not suggested any principled reason for distinguishing between these officers and officers already on the force.

instructed him to fill out the form as he did. Likewise, although he finally joined a reserve unit without obtaining the Department's permission as required by one of its General Orders, he did so only after he received no response to his requests for permission. In any event, although the Department is entitled to receive adequate notice that an officer intends to join the active reserve, it cannot require by General Order or otherwise that its prior approval for that action be obtained.

For these reasons an order will be entered declaring that the Department's one hundred person limit on the number of officers who may be active reservists is unlawful and directing the Department to grant plaintiff's request that he be permitted to join a Marine Corps Reserve unit. However, plaintiff has cited no authority to support his claim to be paid monetary damages

for the amount of pay which he lost because he was unable to train with his reserve unit, and that claim is denied.

Date:

J. Frederick Motz
United States District Judge

STATUTES

The relevant portions of the Veterans' Reemployment Rights Act, 38 U.S.C. Section 2021 et seq, are as follows:

Section 2021(a)

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period not more than one year -

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall -

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall -

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

Section 2021(b) (1)

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

Section 2021(b) (3)

(b)(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty

training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer of such employer's successor in interest, such employee shall be offered employment and, if such person so request, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

No. 89-1949

FILED

JUL 14 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

EDWARD TILGHMAN, et al.,

Petitioners,

v.

ERIC KOLKHORST,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 89-1949

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v.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOURTH CIRCUIT

STATEMENT OF THE CASE

The respondent agrees with the petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT A RESERVIST HAS AN ABSOLUTE RIGHT TO MILITARY LEAVE UNDER 38 U.S.C. SECTION 2024(D) IS IN ACCORD WITH PRIOR SUPREME COURT HOLDINGS AND DOES NOT WARRANT SUPREME COURT REVIEW.

The Fourth Circuit's holding is in accordance with the Veterans Reemployment Rights Act ("VRRA") which provides that any employee of a state or a political subdivision thereof "shall be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States." 38 U.S.C. Section 2024(d). In Monroe v. Standard Oil Company, 452 U.S. 549 (1981) this Court discussed employers' responsibilities under the VRRA, particularly relating to an assertion that employers should make reasonable attempts to schedule around reservists' obligations. Monroe stood for the proposition that the only requirement which Congress explicitly set forth was that employers should provide a leave of absence to reservists whose duties force them to miss time at work. Id. at 565-

66. Significantly, throughout this Court's discussion of the Congressional mandate to employers to provide leaves of absences, the Court never mentioned or even implied that such leaves were subject to a reasonableness requirement. To the contrary, the Monroe Court stated:

> This Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress. If Congress desires to amend § 2021(b)(3) to require special work-hour scheduling for military reservists where it is reasonably possible, it is free to do so. But we must deal with the law as it is.

Id. at 566.

The Baltimore Police Department claims that a reasonableness standard should be applied in deciding reservist's requests for leave. However, it relies on case law with

significantly different facts from the instant case. The first of these cases, Lee v. City of Pensacola, 634 F.2d 886 (5th Cir. 1981), was decided several months prior to the Supreme Court decision in Monroe, which can be seen as modifying the Lee interpretation of the VRA.[1] The remaining cases which the Department cited are inconsistent with the Supreme Court's holding in Monroe. No writ of certiorari was sought in either Eidukonis v. Southeastern Pennsylvania Transportation Authority, 873 F.2d 658 (3rd Cir. 1989) or Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987), and they are left

[1]A Writ of Certiorari was not sought in Lee.

an anomalous result in view of Monroe. The Department's claim that there is a conflict between the circuits is true only to the extent that conflict exists between the cases which it cites and the reasoning of Monroe, which the Fourth Circuit has adopted.

The unjustified threat of termination prevented Kolkhorst from exercising his statutory right to remain in the reservists. The Fourth Circuit correctly stated that this was an impermissible encroachment upon the normal incidents and advantages of employment. (Petitioner's Appendix at p. 11a). Clearly, the Department's policy of limiting the number of reservists to one hundred serves to indiscriminately prevent anyone over the Department-set limit from joining the military reserves. This policy is

contrary to the intent of the VRRA.

II. THE FOURTH CIRCUIT'S HOLDING DOES NOT CREATE A JUDICIALLY UNMANAGEABLE CONFLICT BETWEEN THE CIRCUITS AS THE FACTS OF THIS CASE COMPORT WITH THE REASONABLENESS TEST ADOPTED BY OTHER CIRCUITS.

The Department claims that its reservist policy is subject to a reasonableness standard of review and that under such a standard Kolbrook's application is unreasonable. The Department relies on cases where the reasonableness standard applied is essentially a bad faith test of the actions of the employee applying for the reservists. In fact, the Plaintiff police officer was denied extension of his leave because he failed to inform the Department of his efforts to extend his training and only notified them after

the extension had been secured, indicating bad faith in his behavior regarding the department. The court found his request unreasonable because of this bad faith behavior. 616 F.2d at 605. In Gulf States Paper Corp. v Ingram, 811 F.2d 1464 (11th Cir. 1987) the reasonableness test applied considered only one factor, the employee's conduct. The court rejected any consideration of burden to the employer in deciding the reasonableness of the request, restricting its decision to consideration of whether the plaintiff "acted in a wholly forthright and good faith manner." Id. at 1470.

In Eidukonis v. Southwestern Pennsylvania Transportation Authority, 873 F.2d 688, 694 (3rd Cir. 1989) the court stated that the reasonableness of all of the circumstances of the

appropriate test. However, the facts of the case clearly indicated abusive behavior by the employee which constituted bad faith sufficient to warrant the finding of unreasonableness. The employee had taken over seventeen months military leave over a period of four years, taking the first of the leaves, consisting of a five month tour, only one week after being hired. Id. at 690.

The Department claims that it is necessary to apply a reasonableness test which consequently precludes Kolkhorst from joining the reserves. This is contrary to the language of the VRRA. Even so, by applying the reasonableness standard of these other circuits Kolkhorst's actions would still be reasonable under the test which purportedly gives rise to this conflict

between the circuits. The Fourth Circuit explicitly stated that "even if a standard of reasonableness were applied to Section 2024(d)... Kolkhorst's request for training leave was reasonable," and the Department's policy is "unreasonable per se under any possible formulation of the test." (Petitioner's Appendix at p. 20a) The Department attempts to distinguish its situation from that of employers outside the field of public safety in order to prove that they are not violating the VRRA per se. However, they have failed to distinguish their situation or to provide any factual evidence of the harmful effect of complying with the VRRA's mandatory language. In fact, a survey of twenty-one other comparable city police departments submitted to the district court indicated that the

Maryland State Police is the only department with a limit on the number of officers who can be reservists.

The facts of this case do not warrant Supreme Court review. Upon examination of the factual basis of the other circuits' reasonableness determinations, the facts of this case fit within those parameters and any apparent conflict is readily resolved. Moreover, Monroe is the authoritative decision with which the Fourth Circuit has complied.

The Department also sets forth a new claim that the summary judgment disposition was erroneous. (Petition for Writ of Certiorari, p. 18) It incorrectly attributes the summary judgment disposition to the Fourth Circuit, while in fact this disposition occurred at the trial court level. The

Department claims that there were triable issues of fact concerning the reasonableness of the request for leave. If the Department desired to allege factual disputes existed, it should have raised this claim at the trial court level; in fact, no such claim was made. This is not the appropriate forum in which to make such allegations for the first time. At the trial court level both parties were proceeding in a summary fashion, which would indicate that there were no factual disputes. Both parties moved for summary judgment. The only facts presented at that time were Kolkhorst's, which were sworn to in Affidavits. The Department relied upon conclusory statements of opinion, void of any factual or evidentiary basis, and Kolkhorst continually pointed this out to the trial court. Not only is the

Department precluded from raising this new argument at this juncture, but also there were no prior allegations of such factual disputes.

CONCLUSION

For the foregoing reasons, the respondent Eric Kolkhorst requests that the petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 89-1949

JUL 19 1990
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IN THE

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OCTOBER TERM, 1989

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v.

ERIC KOLKHORST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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No. 89-1949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD TILGHMAN, et al., Petitioners,

v.

ERIC KOLKHORST, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

After holding that a military reservist's request for leave need not be reasonable under 38 U.S.C. Section 2024(d) (a holding in conflict with three other courts of appeals) the Fourth Circuit went on to state in dicta: "[I]f we were to apply a reasonableness standard under Section 2024(d), we would find that Kolkhorst's request

for leave was entirely reasonable, and that the Department's arbitrary policy was not." (Petition for Certiorari, p. 24a).

Petitioner contends that a request for military leave need not be granted under 38 U.S.C. Section 2024(d) unless the request is reasonable from the perspective of both the employee-reservist and the employer. Petitioner also contends that there are triable issues of fact herein concerning the reasonableness of the employee-reservist's request for leave and the employer's response. In support of such contention, in the petition for certiorari Petitioner relies on affidavits it submitted in opposition to Respondent's motion for summary judgment, including, inter alia, the Affidavit of Police Commissioner Bishop L. Robinson.

In his brief in opposition to the petition for certiorari Respondent erroneously contends that Petitioner is raising this factual issue, as precluding summary judgment, for the "first time" in this Court; that Petitioner did not

present "facts" to the trial court, but, instead, according to Respondent, "relied upon conclusory statements of opinion, void of any factual or evidentiary basis." (Respondent's Brief in Opposition, p. 11).

So that there can be no doubt that Petitioner is not relying on "conclusory statements of opinion, void of any factual or evidentiary basis," Petitioner includes in the Appendix hereto portions of the Affidavit of Bishop L. Robinson which was filed in opposition to Respondent's motion for summary judgment.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

STATE OF MARYLAND, CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY that on this 30th day of October, 1987, before me, the subscriber, a notary public of the State of Maryland, in and for the County of Harford, personally appeared Bishop L. Robinson, who being of lawful age and competent to testify, gave oath as follows upon his personal knowledge:

That on July 1, 1984, I was appointed Commissioner of the Baltimore Police Department; at that time I reviewed the policy of my predecessor pertaining to requests to join the active military reserve and determined that said policy was reasonable; I, therefore, continued that policy during my tenure; that policy permitted one hundred (100) sworn members of the Baltimore Police Department to join the various active military reserve units; that the 100 person limit was approved by the Honorable

Roszel C. Thomsen as part of a settlement agreement in the case of Kundrat v. Pomerleau, et al., USDC, DMD., Civil Action No. T07902198, on April 24, 1981; that once a sworn member obtains a position on the list of 100, all subsequent requests for leaves of absence for military training are considered reasonable per se and are granted; that the 100 person figure was deemed to be reasonable based upon the size of the Department at the time and the corresponding hardship which resulted from the subsequent granting of military leave to those members on the list; that as of June 30, 1981, the Baltimore Police Department consisted of 2,968 sworn members (see Exhibit #1 attached hereto); that as of June 30, 1987, that number decreased to 2,925 (see Exhibit #1 attached hereto); that during the time period subsequent to March 1, 1985, the calls for police service increased by 9% (see Exhibit #2 attached hereto); that the majority of military leave taken by members on the 100 person list occurs

during the summer months, i.e. May, June, July, and August (see Exhibit #3 attached hereto); that the summer months are the prime months in which members of the Department also request vacation leave; that requests for vacation leave are determined on a seniority basis and predetermined on an annual basis during the month of February; that members on the 100 person list who request a leave of absence for military leave are given preference over vacation requests from other members of the Department; that during a reservist's absence due to military training, the squad/unit to which he is assigned may be required to work short-handed; that due to the limited manpower resources available, it is not possible to assign other members to cover the absent reservist's assignment; that it is not feasible to train replacement officers, as required by the Maryland Police Training Commission, at a cost to the Department of $3,787.00 per officer (see Exhibit #4 attached hereto) for a period of

26 weeks only to have that replacement officer work for a period of two to three weeks and then be terminated upon the absent reservist's return; . . . that any increase in the 100 person list would place an undue burden upon the Police Department in the event that a large scale mobilization or emergency call-up of the reservists were to occur, ...

S
BISHOP L. ROBINSON

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal the date and year first above written.

S
Diane L. Campisi,
Notary Public
My Commission expires
7/1/90.

(4)

No. 89-1949

DEC 13 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD TILGHMAN, ET AL.,
Petitioners,

v.

ERIC KOLKHORST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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No. 89-1949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD TILGHMAN, et al., Petitioners,

v.

ERIC KOLKHORST, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

INTRODUCTION

The petition for certiorari herein presents the sole question:

> Whether, pursuant to the Veterans' Reemployment Rights Act, 38 U.S.C. Sections 2021-2026 (1982), a reservist has an absolute entitlement

> to a leave of absence from civilian employment regardless of the reasonableness of the leave request or the burden that such leave will impose upon the civilian employer?

On October 1, 1990, this Honorable Court entered an order inviting the Solicitor General to file a brief in this case expressing the views of the United States. The Solicitor General has not yet filed his brief herein, but did, on December 5, 1990, file a petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in William "Sky" King v. St. Vincent's Hospital, No. 90-889 (reported below 901 F.2d 1068), presenting the following sole question, which is virtually identical to the question presented in this case:

> Whether an employee's right under 38 U.S.C. 2024(d) to a leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

In light of the Solicitor General's petition for certiorari in Sky King, and further in light of the likelihood that his brief in this case will oppose the granting of certiorari herein, Petitioners file this supplemental brief.

ARGUMENT

The questions presented in the instant case and Sky King are substantially identical, both calling for the Court's determination of whether 38 U.S.C. 2024(d) includes a "reasonableness" standard. Petitioners and the Solicitor General agree the issue is of great importance, and that the Court should now resolve the division within the Courts of Appeals. Petitioners file this supplemental brief to demonstrate that any contention by the Solicitor General to the contrary notwithstanding, the instant case is more worthy of review than Sky King.[1]

---

[1] Petitioners understand that the Court may conference to consider whether to grant the

As between the two cases, a decision by this Court in the instant case is likely to have greater future impact, and provide more guidance to the lower courts, than a decision in Sky King. Either case will serve equally well if the Court's ultimate conclusion is that a reservist's right to military leave is absolute under 38 U.S.C. 2024(d). On the other hand, if the Court should conclude that an employee's right to leave depends on the reasonableness of the request, then the instant case, which involves the more typical situation faced by

---

instant petition before Respondent's brief in opposition in Sky King is due. In that eventuality, unless the Court is disposed to grant the petition herein, Petitioners respectfully suggest that the Court defer a decision which of the two cases, if either, to accept until after Respondent's brief in opposition in Sky King is considered, since such brief in opposition may demonstrate additional reasons why certiorari in the instant case is more efficacious than in Sky King.

public and private employers who must consider military leave requests, should be preferred over Sky King.

The seventeen day request for leave involved in the instant case is much more typical than the three year request involved in Sky King. A decision that a three year request for leave is subject to a "reasonableness" requirement need not necessarily resolve whether the more typical requests for leave of much shorter duration are subject to a "reasonableness" standard. In Monroe v. Standard Oil Company, 452 U.S. 549, 555-556 (1981) the Court stated that "38 U.S.C. Section 2024(d) was enacted in 1960 to deal with problems faced by employees who had military

training obligations lasting less than three months." [2] (emphasis added). This statement suggests that whether or not a leave request is subject to a "reasonableness" requirement may be contingent upon whether the leave exceeds three months. A decision by this Court in Sky King that requests for leave in excess of three months are subject to the rule of reasonableness would not require the Court to make any determination with regard to whether the more typical request for leave lasting less than three months is subject to such a rule. A decision in the instant case, on the other hand, would necessarily resolve whether requests for leave of less than three months are subject to the condition of reasonableness. Because the

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[2] The 1960 Senate Report on Section 2024(d) states the Section provides protection for trainees who are absent from employment for short periods, such as two hour drills, weekend drills, two week annual encampments, or special training or instruction periods lasting for 30, 60, or 90 days. S. Rep. No. 1672, 86 Cong., 2d Sess. at 2 (1960).

instant case requires a decision on the more typical problem confronted by employers dealing with military leave requests, a decision in the instant case will have greater impact than a decision in Sky King.[3]

Aside from the question of whether 38 U.S.C. 2024(d) is subject to "reasonableness" standard, which both cases present, the instant case provides a better backdrop for consideration of the contours and ramifications of such a standard, and a better basis for a ruling by this Court that will serve as settled precedent to guide the lower courts for many years in the future.

---

[3] In his petition for certiorari in Sky King the Solicitor General acknowledges that "[t]o be sure, most Ready Reservists invoke the protections of Section 2024(d) for shorter periods of training - ordinarily one weekend of inactive duty training per month and 12 days of active duty training per year," and that extended leaves represent the "less common situation[]." Pet. for cert. in Sky King, No. 90-889, pp. 17, 18.

Sky King involves a request for a three year leave of absence, which the Eleventh Circuit held was per se unreasonable without any further inquiry concerning the conduct of the reservist or the particular impact upon the employer. Scant facts are present in Sky King to justify any extended discussion concerning the factors which have given the lower courts trouble in resolving, namely what kind of employee misconduct and what kind of impact on an employer would justify a denial of leave.

On the other hand, in the instant case Petitioner, a municipal police department, adopted a formal written policy on leave requests, based upon a reasonable managerial decision about what accommodations could be made to reservists consistent with its duty to protect the lives and property of the citizens of the City of Baltimore consistent with severe budgetary constraints and limited manpower resources. Unlike the record in Sky King, the

record in the instant case includes evidence produced by the employer concerning the rationale for its policy, and the substantial adverse impact upon its operations which non-adherence to the policy could produce. Thus, the instant case will provide the Court with a better vehicle than Sky King for considering impact on employers as a factor in deciding whether a reasonableness standard may properly be construed in the statute.

Similarly, the record in the instant case contains evidence of "conduct akin to bad faith," Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1469 (11th Cir. 1987), in the reservist's erroneous indication on his employment application that he had no active duty reserve obligations, and in his accepting an assignment in a Selected Reserve Unit without obtaining prior approval from his employer, App., pet. for cert., 7a and 8a. Apart from the mere act of requesting a three year leave, the

conduct of the reservist in Sky King was never at issue. Therefore, the instant case presents a more complete record on the notion that employee misconduct can justify an employer in rejecting a leave request.

Finally, the difference between the employers involved in the case herein and Sky King suggests another weighty reason why a decision herein will have greater impact. Public employers across the nation, such as Petitioner herein, that have a substantial number of reservists employed in public safety agencies such as police departments, fire departments, rescue squads, agency security operations, and civil defense units, are especially in need of guidance from the Court concerning what limitations they may impose on the leave rights of reservists. Public safety agencies may be especially vulnerable when large numbers of reservists request leave at the same time. It is understandable, therefore, that agencies such

as Petitioner would adopt policies to address such problems. A decision in Sky King, however, unlike a decision in the instant case, may leave unresolved issues concerning the separate circumstances which justify a public employer in denying requests for leave.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OTHO M. THOMPSON
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Assistant Solicitor

Supreme Court, U.S.
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DEC 14 1990
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No. 89-1949

In the Supreme Court of the United States

OCTOBER TERM, 1990

EDWARD TILGHMAN, ET AL., PETITIONERS

v.

ERIC KOLKHORST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee's right under 38 U.S.C. 2024(d) to a leave of absence from employment to serve in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1949

EDWARD TILGHMAN, ET AL., PETITIONERS

v.

ERIC KOLKHORST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 1, 1990, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Edward Tilghman is the Commissioner of petitioner Baltimore City Police Department. Pet. ii. The policy of the Police Department, which employs approximately 2900 officers, is to limit to 100 the number of officers who may serve simultaneously in active military reserve units. Pet. App. 6a. Officers who request to join the active reserves after the 100-person limit is reached are placed on a waiting list until an opening occurs. But new hires who are members of an active reserve unit at the

time they apply for employment with the Department are permitted to remain active reservists even if the Department has reached the 100-person limit. *Id.* at 6a-7a.

Respondent Eric Kolkhorst joined the Baltimore City Police Department in 1982. At that time, he was a member of the Individual Ready Reserve, which is one of two components of the Marine Corps Ready Reserve. Pet. App. 5a. Unlike members of the Selected Marine Corps Reserve, members of the Individual Ready Reserve have no required regular monthly meeting or annual training obligations, and thus are not members of an active reserve unit. *Id.* at 5a-6a. At the time respondent joined the Department, 126 officers were members of active reserve units, and 33 officers were on the waiting list. *Id.* at 7a.

On at least two occasions in December 1985, respondent requested permission from the Police Department to join an active reserve unit. Pet. App. 7a-8a. The Department failed to respond to these requests, and on February 1, 1986, respondent accepted a three-year assignment to a Selected Reserve Unit. *Id.* at 8a. On February 4, 1986, Kolkhorst again requested permission to join an active reserve unit; the Department denied this request, but placed him on its waiting list. *Ibid.* Despite lack of formal Department approval, respondent for several months arranged with his immediate superiors for weekend leaves of absence to enable him to train with his reserve unit. *Ibid.*

When respondent notified his superior officers of his orders to report for annual two-week training in August 1986, the Department investigated his reserve status. Pet. App. 8a-9a. On July 8, 1986, the Department denied Kolkhorst's request for training

leave, and on July 23 respondent received a Departmental memorandum directing him to remove himself immediately from active reserve status. *Id.* at 9a. He complied with this directive on the following day.

2. Respondent then filed this action in federal district court, contending that the Police Department had violated 38 U.S.C. 2024(d) by denying him permission to become an active member of the Marine Corps Reserves, and seeking declaratory and monetary relief. Pet. App. 28a. Section 2024(d) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, also known as the Veterans' Reemployment Rights Act (VRRA or the Act), states, in pertinent part, that an employee

> shall upon request be granted a leave of absence by * * * [his] employer for the period required to perform active duty for training * * * in the Armed Forces of the United States. * * *

On cross-motions for summary judgment, the district court held that the Department's 100-person limit on the number of officers who may be active reservists violated Section 2024(d). Pet. App. 28a-39a. Acknowledging that the express terms of Section 2024(d) "unequivocally require an employer to give any military reservist in its employ a leave of absence to participate in military training," the court noted that courts "have used a rule of reason as the lubricant necessary to make the statutory machinery function." Pet. App. 32a-34a. The district court recognized, however, that there was disagreement over the factors that should be considered in making a determination of reasonableness. *Id.* at 34a. The court elected to follow the approach taken by the Eleventh Circuit in *Gulf States Paper Corp.* v.

Ingram, 811 F.2d 1464 (1987), which focuses on the conduct of the reservist. Pet. App. 35a-37a. Applying that standard, the court concluded that "[n]othing in the record suggests [respondent] has acted unreasonably or in an improper manner." *Id.* at 37a. The court thus directed the Police Department to grant Kolkhorst's request to join an active reserve unit, and awarded him damages of $4,164 as compensation for lost income and benefits that he would have earned by participating in reserve training. *Id.* at 38a; App., *infra*.

3. The court of appeals affirmed.[1] The court held that the Police Department's refusal to grant respondent's leave request violated Section 2024(d), and that compensation for lost pay and benefits could be awarded under 38 U.S.C. 2022. The court also concluded that the Department's reservist policy violated 38 U.S.C. 2021(b)(3), which prohibits discrimination in employment based on reserve obligations. Pet. App. 11a.

With respect to Section 2024(d), the court held that nothing in the VRRA, its legislative history, or this Court's decisions "indicate[s] that a reservist is entitled to a leave of absence in order to participate in military training *only* if the request is reasonable based on a judicially created standard that varies from one jurisdiction to the next." Pet. App. 19a. The court noted that "the VRRA unconditionally provides that any reservist '*shall* upon request be granted a leave of absence by such person's employer for the period required to perform' " the pertinent

[1] Although the Secretary of Labor had not participated in the district court proceedings, she filed a brief as amicus curiae supporting respondent and participated in oral argument.

duty. *Ibid.* (emphasis added by court). Quoting this Court's decision in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 555 (1981), the court observed that under Section 2024(d), "employees *must* be granted a leave of absence * * * and, upon their return, be restored to their position." Pet. App. 19a-20a (emphasis added by court). The court concluded that "the reasonableness standards that have been imposed by other courts are contrary to the purpose of Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." Pet. App. 20a.

The court held in the alternative that even if a standard of reasonableness were applied to Section 2024(d), respondent's leave request was reasonable and the Police Department's 100-officer limit was unreasonable "under any possible formulation of the test." Pet. App. 20a. The court noted that respondent's requested leave was "reasonably made and reasonable in content." *Id.* at 20a-21a. Conversely, the Department's reservist policy is unreasonable because "it prevents any active military training *at all* for individuals like Kolkhorst who are not on the one hundred person reservist list." *Id.* at 22a-23a.

Turning to the question of relief, the court held that full monetary damages for violations of Section 2024(d) are authorized by 38 U.S.C. 2022, which empowers district courts to compensate a reservist "for *any* loss of wages or benefits suffered by reason of such employer's unlawful action" (emphasis added by court). Pet. App. 24a-25a. The court thus rejected the Police Department's argument that Section 2022 applies only to wages and benefits that the employee would have earned from an employer, and not

to income derived from the employee's military duty. Pet. App. 25a.[2]

The court also held that the "Department's official reservist policy" conflicts with Section 2021(b)(3). Pet. App. 13a-14a. This policy, according to the court, clearly precipitated the Department's unlawful order instructing respondent "either to withdraw from the active reserves or face dismissal." *Id.* at 13a.

DISCUSSION

The question presented in this case is whether, under Section 2024(d) of the VRRA, an employee's right "upon request [to] be granted a leave of absence * * * to perform active duty for training * * * in the Armed Forces of the United States" is conditioned on the "reasonableness" of the employee's request for leave. The question is the same as that presented in *King* v. *St. Vincent's Hospital*, No. 90-889, in which the government filed a petition for a writ of certiorari on December 5, 1990.[3]

In this case, as in *King*, the court considered the legality under Section 2024(d) of an employer's denial of a request for leave to perform "active duty for training." The court of appeals here disagreed with the analysis adopted in *King* and in decisions of other courts of appeals that have considered this issue (see Pet. at 18-21 in *King* v. *St. Vincent's Hospital*, No. 90-889), and held that Section 2024(d) does not require that a leave request be "reasonable." As we discussed in our petition in *King*, the Fourth

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[2] The court upheld as not clearly erroneous the amount of damages awarded by the district court. Pet. App. 26a.

[3] We have served petitioners and respondent with a copy of our petition for a writ of certiorari in *King* v. *St. Vincent's Hospital*.

Circuit's interpretation of Section 2024(d) in this case correctly construes the language of the provision in a manner consistent with its underlying purposes.

In *King*, the Eleventh Circuit ruled that requests for leave under 2024(d) should be analyzed for reasonableness, and that a three-year leave request was *per se* unreasonable. We recommended review by this Court of that decision in light of the potential impact of that ruling on the ability of the reserve components to recruit personnel for lengthy tours of duty, and the potential effects on the reserve components and the Armed Forces as a whole of the disagreement among the courts of appeals on the proper interpretation of Section 2024(d).

In our view, *King* provides a more appropriate vehicle than the present case for resolution of the important question presented by both petitions. In the present case, the court of appeals clearly established, as the law of the circuit, that there is no reasonableness test under Section 2024(d), but it also held, in the alternative, that petitioner's request was reasonable. The court held, in addition, that the employer had violated the anti-discrimination provisions of Section 2021(b)(3). Thus, unlike the decision in *King*, the outcome below might be unaffected even if the court's holding with respect to the existence of a reasonableness test under Section 2024(d) is determined to be in error.

We believe that the appropriate course is to hold this petition pending this Court's disposition of *King*. If the Court grants review in *King* and ultimately decides that no reasonableness test may be imposed under the statute, the present petition could appropriately be denied. If the Court determines that some test of reasonableness is required, we believe that the

court below should be afforded an opportunity to consider the impact of that determination on all aspects of its decision—including its alternative conclusion that the specific request for leave was a reasonable one.[4]

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition in *King* v. *St. Vincent's Hospital*, No. 90-889.

Respectfully submitted.

KENNETH W. STARR
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DAVID L. SHAPIRO
Deputy Solicitor General

ALLEN H. FELDMAN
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AMY L. WAX
Assistant to Solicitor General

STEVEN J. MANDEL
Deputy Associate Solicitor
Department of Labor

DECEMBER 1990

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[4] Although the court below also found a violation of Section 2021(b)(3)—a provision not directly involved in *King*—the award of damages appears to have been based solely on the violation of Section 2024(d). See Pet. App. 14a, 24a. Were the Fourth Circuit on remand to find that there was no Section 2024(d) violation, it is not certain that the award would be sustained on the basis of a Section 2021(b)(3) violation alone. Moreover, it has been suggested that the two statutory provisions may not be completely independent in that the statutory requirement of a request for leave might affect entitlement to relief under both Sections 2024(d) and 2021(b)(3). See *Burkhart* v. *Post-Browning*, 859 F.2d 1245, 1247 (6th Cir. 1988); *Blackmon* v. *Observer Transportation Co.*, 102 Lab. Cas. (CCH) ¶ 11,450 (W.D.N.C. 1982), aff'd, 756 F.2d 1000 (4th Cir. 1985) (en banc).

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. JFM-86-3057

ERIC KOLKHORST

v.

BISHOP L. ROBINSON, et al.

ORDER

For the reasons stated in the opinion entered herein on June 10, 1988 and on the record in open Court on February 10, 1989, it is this 15th day of February 1989

ORDERED

1. The order entered by this Court on June 13, 1988 is hereby incorporated by reference and is confirmed; and

2. Monetary damages are awarded in favor of plaintiff in the amount of $4,164.00, consisting of (a) $1,891.00 of income from lost drills in 1986, (b) $1,733.00 in lost income from summer camp in 1986 and (c) prejudgment interest in the amount of $540.00 (running from January 1, 1987 at the rate of 7% per year).

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1949

IN THE

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OCTOBER TERM, 1989

EDWARD TILGHMAN, ET AL.,
Petitioners,

v.

ERIC KOLKHORST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

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No. 89-1949

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDWARD TILGHMAN, ET AL.,

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ERIC KOLKHORST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

The Respondent files this Supplemental Brief in response to the Petitioners' Supplemental Brief and the Brief for the United States as Amicus Curiae.

ARGUMENT

The question presented in both the present case and King v. St. Vincent's Hospital, No. 90-889, is whether, pursuant to 38 U.S.C. §2024(d), an employee's right upon request to be granted a leave of absence to perform active duty for training in the Armed Forces of the United States is conditioned on the "reasonableness" of the employee's request for leave. The Petitioners argue that it is more appropriate for the Court to hear this case than King. The United States argues that the Court should defer decision on whether to hear this case until after it hears and decides King. Since it has been held below that

the Respondent's request for leave was reasonable, the Court should deny the petition for writ of certiorari and hear the King case in the event the Court desires to decide the question presented by both cases.

In this case, the Fourth Circuit has ruled that a request for leave under §2024(d) is not conditioned on the "reasonableness" of the employee's request. Importantly, the court further held that, in the alternative, even if there were such a requirement, Kolkhost's request for a leave of absence was reasonable and that the Baltimore City Police Department had violated his rights. Thus, even if this Court were to hold that a reasonableness test should be

applied, the result in this case would not change because the lower court has already determined that the request was reasonable. The very reason advanced by the Department for granting certiorari in this case is, in fact, the strongest argument against further review.

In contrast, the Eleventh Circuit has held in King that a request under §2024(d) is subject to a condition of reasonableness and that the request made in King was per se unreasonable. Should this Court wish to decide the question presented it should hear the King case because only the outcome in King can potentially be changed by this Court's decision on the question presented. Should the

Court rule either that there is no reasonableness requirement or that there is a reasonableness requirement and a three-year request is not per se unreasonable, then the outcome in King will change.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,
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